

Lord Edmund-Davies in the House of Lords' case of *Floor v. Davis (Inspector of Taxes) supra*, the provisions of the Act must be construed having regard to the Interpretation Acts 1948 and 1967. There is therefore a doubt whether the Legislature had intended to impair the existing right of the tax payer and inflict a detriment to it as it takes away a vested right under the existing law to exemption from tax. As there is a doubt the ambiguity must be construed in favour of the tax payer as the said exemption from tax has not been removed by sufficiently clear words to achieve that purpose. We therefore allowed the appeal with costs here and below, set aside the decision of the learned Judge and restored the Deciding Order of the Special Commissioners that the assessments be discharged. We also ordered that the deposit be refunded to the tax payer.

WONG SIN CHONG & ANOR.
v.
BHAGWAN SINGH & ANOR.

SUPREME COURT, KOTA BHARU
TAN SIR DATO' HARUN BIN
MAHMUD HASHIM,
TAN SRI DATO' HAJI MOHD AZMI
BIN DATO' HAJI KAMARUDDIN,
DATO' MOHAMED DZAIDDIN BIN HJ.
ABDULLAH SCJJ
[CIVIL APPEAL NO. 02-572 OF 1991]
8 OCTOBER 1993

PRACTICE & PROCEDURE: Action against former solicitors for professional negligence - Issue of writ of subpoena ad testificandum and duces tecum - O. 38 r. 14 RHC 1980 - Subpoena requiring plaintiffs' current Counsel to give oral evidence for the defence and to produce documents - Application to set aside subpoena - Application dismissed with costs - Appeal against decision.

The plaintiffs were sued for general and special damages in an action for wrongful seizure and sale of goods. Judgment in default was entered against the plaintiffs and the plaintiffs application to set aside the judgment was dismissed as was the appeal therefrom. The respondents were the plaintiffs solicitors at the material time and the plaintiffs commenced action against them for professional negligence.

The first respondent acting on behalf of himself and on behalf of the former solicitor's firm issued a writ of subpoena *ad testificandum* and *duces tecum* under O. 38 r. 14 RHC 1980 for the plaintiffs present Counsel to give oral evidence for the defence and as well as to produce documents.

The plaintiffs applied to set aside the subpoena on the ground that their Counsel did not have any personal knowledge on any facts relating to the professional negligence and as such could not give any material evidence. The plaintiffs further contended that the issue of the subpoena had been made *mala fide* and was an abuse of the Court process in that it had been served with a hidden motive of preventing Counsel from continuing to act for them in the partly heard case.

The plaintiffs also contended that to deny them their Counsel's services at this late juncture

would be oppressive. The plaintiffs' application to set aside the subpoena was dismissed with costs and the plaintiffs appealed.

Held:

[1] The right of a party to the attendance of witnesses is a crucial part of our judicial system, but the right must be protected against any oppression or abuse. In every case the onus is on the party issuing the subpoena to show the materiality of the witness for the just decision of the case, in that it outweighs any oppression that may be caused to the party objecting. In the present appeal, it was for the respondents to satisfy the Court, on balance, of the materiality of the evidence of the appellants' Counsel as their witness before the appellants could be deprived of their right to the services of their Counsel.

[2] Even if it was permissible for Counsel, notwithstanding the subpoena to continue as Counsel for the appellants, it was imperative for the Court to be satisfied that Counsel was in a position to give material evidence before he could be ordered to give evidence for the opposite side.

[3] In the circumstances of the case the learned Judge ought to have relied more on the particulars of negligence pleaded in the statement of claim to determine materiality rather than on the three matters which he himself had thought to be relevant matters.

The particulars of negligence on failure to inform of the hearing date and failure to appear at the hearing were clearly the direct cause of the entry of default judgment against the appellants.

[4] From the arguments it was obvious that the appellants' Counsel could not possibly give any material evidence on the alleged failure of the first respondent to inform the appellants of the hearing date and on the alleged failure of the first respondent to be present at the trial. The only matter on which the appellants' Counsel could possibly have personal knowledge was on the particulars of negligence relating to the failure to apply in time to set aside the judgment which was evidence of collateral facts not directly relevant to the entry of the default judgment.

[5] As it was not part of the defence that the appellants' Counsel was guilty of any contributory negligence, the learned Judge ought to have

a come to the conclusion that on the pleadings the respondents had failed to satisfy the Court on the materiality of the evidence that Counsel could possibly offer to the defence. Save for annoyance and confrontation, no useful purpose would be obtained by the attendance of the appellants' Counsel as a witness.

b [6] Further, there was no explanation for the delay in the issue of the subpoena notwithstanding the notice given earlier, and having regard to its timing, there could be no doubt, on balance, that it was an oppressive subpoena with a *mala fide* motive of depriving the appellants of the services of their Counsel in the middle of the hearing. In the circumstances the subpoena was an abuse of process and as such the Court had a duty to set it aside.

c [Appeal allowed. Appellants application to set aside subpoena allowed. Costs to the appellant against the first respondent. No order as to costs against second respondent].

[Bahasa Malaysia Translation of Headnote]

e **AMALAN & PROSEDUR: Tindakan terhadap bekas peguamcara bagi kecuaiian profesional - Mengeluarkan writ sepina ad testificandum dan duces tecum - A. 38 k. 14 KMT 1980 - Sepina menghendaki Peguam plaintiff untuk memberikan keterangan lisan bagi pembelaan dan mengemukakan dokumen-dokumen - Permohonan bagi mengenepikan sepina - Permohonan ditolak dengan kos - Rayuan terhadap keputusan.**

f Plaintiff-plaintiff telah disaman untuk gantirugi am dan khas dalam suatu tindakan bagi rampasan dan jualan barangan secara salah. Penghakiman keingkaran telah dicatatkan terhadap plaintiff-plaintiff dan permohonan plaintiff-plaintiff untuk mengenepikan penghakiman telah ditolak dan begitu juga dengan rayuan mengenainya. Pihak responden adalah merupakan peguamcara plaintiff-plaintiff pada waktu yang berkenaan dan plaintiff-plaintiff memulakan tindakan terhadap mereka bagi kecuaiian profesional.

g Responden pertama yang mewakili dirinya sendiri dan bagi pihak firma bekas peguamcara telah mengeluarkan writ sepina ad testificandum dan duces tecum di bawah A. 38 k. 14 KMT 1980 bagi Peguam semasa plaintiff-plaintiff untuk memberikan keterangan lisan bagi pembelaan dan juga pengemukakan dokumen-dokumen.

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Plaintif-plaintif memohon untuk mengeneipkan sepina atas alasan bahawa Peguam mereka tidak mempunyai sebarang pengetahuan sendiri mengenai mana-mana fakta yang berhubung dengan kecuaiian profesional dan oleh yang demikian tidak dapat memberikan sebarang keterangan material. Selanjutnya plaintiff-plaintif menghujahkan bahawa pengeluaran sepina dibuat secara *mala fide* dan merupakan penyalahgunaan proses Mahkamah di mana ia telah disampaikan dengan motif tersembunyi bagi menghalang Peguam daripada meneruskan mewakili mereka dalam kes sambung bicara.

Plaintif-plaintif juga menghujahkan bahawa untuk menafikan mereka akan khidmat Peguam mereka diperingkat yang lewat ini adalah merupakan sesuatu yang bersifat penindasan. Permohonan plaintiff-plaintif untuk mengeneipkan sepina telah ditolak dengan kos dan plaintiff-plaintif membuat rayuan.

Diputuskan:

[1] Hak sesuatu pihak kepada kehadiran saksi-saksi adalah merupakan bahagian yang penting dalam sistem kehakiman kita, tetapi hak tersebut perlulah dilindungi daripada sebarang penindasan atau penyalahgunaan. Dalam mana-mana kes bebannya terletak ke atas pihak yang mengeluarkan sepina untuk menunjukkan kematerialan saksi-saksi bagi keputusan yang adil akan kes tersebut, di mana ia jauh melebihi sebarang penindasan yang mungkin disebabkan oleh pihak pembangkang. Dalam rayuan ini, pihak responden yang patut memuaskan hati Mahkamah, atas imbalan, mengenai kematerialan keterangan Peguam perayu-perayu sebagai saksi mereka sebelum perayu-perayu dinafikan hak mereka kepada khidmat Peguam mereka.

[2] Jika sekalipun Peguam dibenarkan, meskipun adanya sepina untuk meneruskan mewakili sebagai Peguam bagi perayu-perayu, adalah penting untuk Mahkamah berpuashati bahawa Peguam berada dalam kedudukan untuk memberikan keterangan material sebelum beliau diperintahkan untuk memberikan keterangan bagi pihak yang menentang.

[3] Dalam hal kes ini, Hakim yang bijaksana tersebut patut bergantung lebih ke atas butir-butir kecuaiian sebagaimana yang diguamkan di dalam pernyataan tuntutan untuk menentukan kematerialan berbanding dengan tiga perkara yang mana beliau sendiri telah fikirkan sebagai perkara-perkara yang relevan.

a Butir-butir kecuaiian atas kegagalan untuk memaklumkan mengenai tarikh pendengaran dan kegagalan untuk hadir dipendengaran tersebut jelas merupakan sebab yang membawa kepada penghakiman keingkaran dicatatkan terhadap perayu-perayu.

b [4] Daripada penghujahan berkenaan adalah jelas bahawa Peguam perayu-perayu tidak mungkin dapat memberikan sebarang keterangan material mengenai dakwaan kegagalan responden pertama untuk hadir diperbicaraan tersebut. Satu-satunya perkara yang mana Peguam perayu-perayu mungkin c sekali mempunyai pengetahuan sendiri ialah mengenai butir-butir kecuaiian berhubung dengan kegagalan untuk memohon dalam masa yang sempit bagi mengeneipkan penghakiman tersebut yang merupakan keterangan mengenai fakta-fakta kolateral yang tidak relevan secara langsung kepada pencacatan penghakiman keingkaran.

d [5] Memandangkan tidak menjadi sebahagian daripada pembelaan bahawa Peguam perayu-perayu adalah bersalah mengenai sebarang kecuaiian sertaan, Hakim yang bijaksana tersebut sepatutnya mencapai kesimpulan bahawa e atas pliding berkenaan responden-responen telah gagal untuk memuaskan hati Mahkamah mengenai kematerialan keterangan yang dapat diberikan oleh Peguam kepada pembelaan. Kecuali bagi gangguan dan konfrantasi, tiada tujuan yang berfaedah dapat diperolehi atas kehadiran peguam perayu-perayu sebagai saksi.

f [6] Selanjutnya, tiada penjelasan bagi g kelewatan dalam pengeluaran sepina berkenaan meskipun adanya notis yang diberikan terlebih dahulu, dan dalam mengambil kira pemaannya, tidak syak lagi, atas imbalan, bahawa ia merupakan sepina bersifat penindasan dengan suatu motif *mala fide* bagi menafikan perayu-perayu daripada mendapatkan khidmat Peguam mereka di pertengahan perbicaraan. Dalam hal ini, sepina tersebut merupakan penyalahgunaan proses Mahkamah dan oleh yang demikian Mahkamah h mempunyai kewajipan untuk mengeneipkannya.

[Rayuan dibenarkan. Permohonan perayu-perayu untuk mengeneipkan sepina dibenarkan. Kos kepada perayu terhadap responden pertama. Tiada perintah mengenai kos terhadap responden i kedua].

Cases referred to:

Palaniappa Chettiar v. Arunasalam Chettiar [1961] MLJ xxxiii (**refd**)
Raymond v. Tapson [1883] 22 Ch. D 430 CA (**refd**)
Re Mundell, Fenton v. Cumberlege [1883] 52 LJ Ch. 756 (**refd**)
PP v. Vengadasalam & Ors. [1990] 1 MLJ 507 (**fol**)
Emperor v. Dadu Ramu, AIR 1939 Bom. 150 (**fol**)
R v. Baines [1909] 1 KB 258 (**refd**)
Ismail v. Hasnul, Abdul Ghafar v. Hasnul [1968] 1 MLJ 108 (**refd**)

Legislation referred to:

Federal Constitution, Article 5(3)
 Legal Profession (Practice and Etiquette) Rules 1978, r. 28(a)
 Rules of the High Court 1980, O. 35 r. 2(2), O. 38 r. 14

Other sources referred to:

Mallal's Supreme Court Practice, 2nd Edn., pp. 452, 453

For the appellants - Wrigglesworth; M/s. Wrigglesworth & Co.
For the 1st respondent - Bhagwan Singh; M/s. Bhagwan Singh & Co.
For the 2nd respondent - Robert Lazar; M/s. Shearn Delamore & Co. and Drew & Napier

JUDGMENT**Haji Mohd Azmi bin Dato' Haji Kamaruddin SCJ:**

The present dispute between the appellants (hereinafter referred to as "the Wongs") and the respondents, (hereinafter also referred to as "the former solicitors") has its roots in 1978 when the Wongs were sued in the Kota Bharu High Court by Lian Mah Trading Agency Sdn. Bhd. ("the Company") for general and special damages in an action for wrongful seizure and sale of goods, namely Komatsu Angle Dozer, of which the Company had claimed to be the owners. The Wongs who were then represented by the respondents, had denied the various allegations in the statement of claim, and pleaded in their defence that the Komatsu Angle Dozer actually belonged to one Syarikat Perusahaan Berangkat Sdn. Bhd. ("the Syarikat") against whom they had the right of seizure and sale. They also pleaded waiver on the ground that the Company had not filed any objection proceeding against the auction sale. When the 1978 case came up for hearing before Mohamed Zahir J., on 16 May 1981, neither the Wongs nor their then Counsel, Mr. Bhagwan Singh (the 1st respondent herein) a partner of Messrs. Lim Soh Wah, Bhagwan & Partners, were present,

a resulting in default judgment being entered against the Wongs in the total sum of RM81,000 comprising of RM65,000 for the value of the Komatsu Angle Dozer and RM16,000 as damages for loss of its use.

b More than a month later, on 18 June 1981, Mr. Bhagwan Singh who was then still acting for the Wongs, applied by summons-in-chambers to set aside the default judgment. On 23 August 1981 with the consent of the former solicitors, there was a change of solicitors whereby the Wongs had engaged Messrs. Wrigglesworth & Company in place of their former solicitors. At the hearing of the application to set aside on 16 September 1981, Mohamed Zahir J., with the consent of the parties, agreed to hear the application together with a fresh application by the Wongs to extend time since the application to set aside was filed outside the seven days from the date of service of the order of default judgment, and therefore did not comply with O. 35 r. 2(2) RHC 1980. After hearing arguments, Mohamed Zahir J., dismissed both the applications. An appeal to the then Federal Court by Dato' Wrigglesworth was also dismissed which finally put an end to any hope by the Wongs to set aside the 1981 default judgment. It was under these circumstances, that the Wongs instructed Dato' Wrigglesworth to commence action against their former solicitors for professional negligence. The writ against them was filed on 22 December 1985. Hearing of the suit commenced on 5 December 1990, during which two witnesses for the Wongs gave evidence and this was followed by another two witnesses (PW3 and PW4) the next day, but before PW4 was cross-examined, the hearing was adjourned to 23 April 1991 for continued hearing. On 14 April 1991, that is, about a week before the date of continued hearing, the 1st respondent on his own behalf and on behalf of the former solicitor's firm issued a writ of *subpoena ad testificandum* and *duces tecum* under O. 38 r. 14 RHC 1980, for the Wongs' present Counsel, Dato' Wrigglesworth to give oral evidence for the defence and as well as to produce documents. By summons-in-chambers dated 3 August 1991, the Wongs applied to have the subpoena against their Counsel set aside on the principal ground that Dato' Wrigglesworth did not have any personal knowledge on any facts relating to the professional negligence case, and as such could not give any material evidence. By paragraph 12 of the summons, it was also contended that the issue of the

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subpoena had been made *mala fide* and was an abuse of the Court process in that it had been served with a hidden motive of preventing Dato' Wrigglesworth from continuing as Counsel for the Wongs in the partly heard case. Further, the Wongs contended that Dato' Wrigglesworth had been acting for them for the past ten years ever since the alleged professional negligence was committed, and as such a change of Counsel at that late juncture would be oppressive. On 5 December 1991, the Wongs' application to set aside the subpoena was dismissed with costs. Hence the present appeal.

Before us it was contended on behalf of the Wongs that by refusing to set aside the writ of subpoena dated 14 April 1992, the learned Judge had effectively prevented Dato' Wrigglesworth from continuing to be their Counsel in the part-heard professional negligence case, and consequently had also the effect of forcing the Wongs to engage a new Counsel after the hearing of the civil suit had already commenced for two days. We hasten to add, however, that although changing horses in mid-stream would not be recommended, the Wongs' constitutional right to be represented by Dato' Wrigglesworth as a Counsel of his choice under Article 5(3) of the Federal Constitution is subject to Dato' Wrigglesworth willingness and ability to do so [see Practice Note issued in relation to Federal Court decision in *Palaniappa Chettiar v. Arunasalam Chettiar* [1961] MLJ xxxiii]. If the learned Judge is correct in law in holding that Dato' Wrigglesworth is a material witness for the former solicitors, that is to say, the materiality of his evidence outweighs any oppression that might be occasioned to the Wongs, then due to the legal impediment imposed by the subpoena, Dato' Wrigglesworth cannot be said to be a Counsel who is able though willing to continue to represent them throughout the litigation.

It has been said that the retainer of a solicitor is *prima facie* an entire contract. In our view, a solicitor is bound to see the case through even though the clients fail to pay him sufficient advances. It is his duty if properly instructed and provided with funds out of pocket, to act for his client throughout the litigation. Generally speaking, however, the duty of a solicitor to do justice, if he is a material witness to a case, is of greater paramount than his duty to represent a client. In our opinion that duty is the rationale behind Rule 28(a) of the Legal Profession

(Practice and Etiquette) Rules 1978 to which our attention has been drawn by both Counsels. Rule 28(a) provides:

An advocate and solicitor shall not appear in Court or in Chambers if any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.

The right of a party to the attendance of witnesses is a crucial part of our judicial system, but the right must be protected against any oppression or abuse. Thus in *Raymond v. Tapson* [1883] 22 Ch. D. 430 CA, it was held that any party may without leave of the Court, issue a subpoena for the examination of a witness at any stage of an action; but the Court will exercise a control over the privilege to prevent it being oppressively used. In that case, the plaintiffs had subpoenaed a solicitor, who had acted for both parties in a mortgage transaction, in order to examine him with respect to the monies received by him on account of both parties. The Court held that the plaintiff was entitled to issue the subpoena and to examine the witness. But, where no useful result would be obtained by the attendance of a witness, the subpoena should be refused - see *Re. Mundell, Fenton v. Cumberlege* [1883] 52 LJ Ch. 756. At p. 452, Mallal's **Supreme Court Practice**, 2nd Edn., citing *Raymond v. Tapson* (*ante*) as authority, it is stated that:

An oppressive subpoena (for purposes of annoyance, or in spite, to a man's wife or unmarried daughters and the like) will be set aside by the court, on application on behalf of the witness, as being an abuse of the party's privilege to issue a subpoena without leave.

It is further stated at page 453 that:

The court has inherent jurisdiction to set aside a subpoena which is issued from an improper motive and not for obtaining relevant evidence, and there is no distinction, on the point, between civil and criminal proceedings: *The King v. Baines* [1909] 1 KB 258.

In *PP v. Vengadasalam & Ors.* [1990] 1 MLJ 507, Lim Beng Choon J. held that the *onus* of proof was on the prosecution to provide the Court with some material to indicate that the Counsel representing the accused was a material witness for the prosecution before the

accused could be deprived of the services of the Counsel of his choice. In the course of his judgment, Lim Beng Choon J. cited the following statement of Beaumont CJ in *Emperor v. Dadu Ramu*, AIR 1939 Bom. 150:

The question whether the court has jurisdiction to forbid an advocate to appear in a particular case involves the consideration of conflicting principles. On the one hand, an accused person is entitled to select the advocate whom he desires to appear for him, and certainly the prosecution cannot fetter that choice merely by serving a subpoena on the advocate to appear as a witness. On the other hand, the court is bound to see that the due administration of justice is not in any way embarrassed. Generally, if an advocate is called as a witness by the other side, it can safely be left to the good sense of the advocate to determine whether he can continue to appear as an advocate, or whether by so doing he will embarrass the court or the client. If a court comes to the conclusion that a trial will be embarrassed by the appearance of an advocate, who has been called as a witness by the other side, and if, notwithstanding the court's expression of its opinion, the advocate refuses to withdraw, in my opinion in such a case the court has inherent jurisdiction to require the advocate to withdraw. An advocate cannot cross-examine himself, nor can he usefully address the court as to the credibility of his own testimony, and a court may well feel that justice will not be done if the advocate continues to appear. But, in my opinion, the prosecution in such a case must establish to the satisfaction of the court that the trial will be materially embarrassed, if the advocate continues to appear for the defence.

We would with respect adopt the above statement of the law which in our opinion applies to both criminal and civil cases with equal force. In every case, the onus is on the party issuing the subpoena to show the materiality of the witness for the just decision of the case, in that it outweighs any oppression that may be caused to the party objecting. Thus, in the present appeal, it was for the former solicitors (the respondents) to satisfy the Court on balance of the materiality of the evidence of Dato' Wrigglesworth as their witness, before the Wongs (the appellants) could be deprived of their right to the services of Dato' Wrigglesworth. Even if it was permissible for Dato' Wrigglesworth, notwithstanding the subpoena to continue as Counsel for the Wongs, in our view it would still be imperative for the Court to be satisfied that Dato' Wrigglesworth

a was in a position to give material evidence in the case, before he as Counsel for the Wongs could be ordered to give evidence for the opposite side.

The first question for determination in this appeal was whether the learned Judge had stated the correct legal principles, and secondly **b** whether he had properly applied the law to the facts of the case, before refusing to set aside the subpoena. In other words, had the learned Judge sufficiently considered firstly the issue of materiality of the evidence to be elicited by the defence from Dato' Wrigglesworth; secondly, the issue of oppression since Dato' Wrigglesworth had been a long standing solicitor and Counsel for the Wongs, and thirdly the issue of abuse of privilege or process, in the light of the delay in issuing the subpoena after the hearing had commenced for two days.

From pages 4 and 5 of his grounds of judgment, **d** the learned trial Judge was clearly aware of the correct principles when he stated that although a litigant was entitled to serve a subpoena on anyone as a witness, the Court had inherent jurisdiction to set it aside if it was an abuse of process of the Court or not made *bona fide* for the purpose of obtaining relevant evidence and that **e** the witness was in fact unable to give relevant evidence. His Lordship referred to the case of *R v. Baines (ante)*, where the attendance of the witness was required only for confrontation and therefore was an abuse of the privilege. He also considered the decision of the Federal Court in *Ismail v. Hasnul, Abdul Ghafar v. Hasnul* **f** [1968] 1 MLJ 108, where it was held that:

(1) ... The evidence which the respondent was seeking to establish was evidence of collateral facts not reasonably conclusive even if established, and which have no connection with the main fact in the defamation suit. It was therefore, not apparent in what way the appellants could give any relevant evidence to assist the defence;

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(2) ... In the particular circumstances of this particular case the court has a right to protect the appellants from the practice and process of this court being used simply for a matter that is misconceived and not for the purposes of justice.

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In that case Raja Azlan J. (as he then was) also held:

... But the court possesses inherent jurisdiction to see that this privilege is properly exercised and in a proper case can restrain its abuse.

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Save for their application, we were satisfied that the learned Judge had stated the correct principles in particular the need for the party issuing and serving the subpoena to show to the Court in what way the person served with the subpoena could give any relevant evidence. It is not therefore sufficient merely to show that the person is an advocate and solicitor in the case, because merely holding such position does not *ipso facto* credit him with personal knowledge of relevant evidence on which he can testify as such evidence are invariably hearsay evidence or privilege communication between solicitor and client.

In his grounds of judgment, the learned Judge had reproduced all the twelve grounds advanced by the Wongs in their summons-in-chambers for setting aside the subpoena. His Lordship had however concluded that only the following three matters were relevant for the purpose of determining the materiality of Dato' Wrigglesworth's evidence:

- (i) Failure of Mr. Bhagwan Singh to appear in court on 16 May 1981 before Mohamed Zahir J. in Civil Suit No. 148/1978.
- (ii) Failure of Mr. Bhagwan Singh to set aside the default judgment within time limit.
- (iii) Failure of Mr. Bhagwan Singh to apply for extension of time to file the application to set aside the default judgment.

Although the learned Judge held that Dato' Wrigglesworth could not give material evidence on (i), *viz.* failure of Mr. Bhagwan Singh to appear, His Lordship was satisfied that as regards matters (ii) and (iii), *viz.* failure to set aside and to apply for extension of time, Dato' Wrigglesworth as the new solicitor, was in a position to remedy the procedural defects, and therefore could give material evidence on them. The learned Judge seemed to attach considerable blame on Dato' Wrigglesworth for the delay in filing the application to set aside the default judgment, and also for filing an inadequate affidavit in support of the application for extension of time. In our opinion, if Dato' Wrigglesworth were to be blamed wholly or partly for the professional negligence alleged by the Wongs, then he should properly be joined as a party in the proceedings and not merely called as a witness.

For the determination of this appeal, it is important to identify the particulars of professional negligence alleged by the Wongs against their

a former solicitors. In the circumstances of the case, the learned Judge ought to have relied more on the particulars of negligence pleaded in the statement of claim to determine materiality rather than on the three matters which he himself had thought to be relevant matters. On close scrutiny, they are not exactly the same.

b The professional negligence pleaded in paragraph 3 of the statement of claim refers specifically to three particulars, namely:

- (i) Failing to inform the plaintiffs of the date of trial of Kota Bharu High Court Civil Suit No. 148 of 1978 in which the plaintiffs were the defendants and the abovenamed defendants were the solicitors of the plaintiff.
- (ii) Failing to appear at the trial of the said civil suit in the High Court at Kota Bharu on the date fixed for the trial, namely on 16 May 1981.
- (iii) Failing to apply in time to set aside the order made by the Court on 16 May 1981 in default of the appearance of the defendants at the hearing of the said suit.

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In our view, particulars of negligence against the former solicitors in (i) on failure to inform and (ii) on failure to appear, are clearly the direct cause of the entry of default judgment against the Wongs. The third particulars of negligence under (iii) on failure to apply to set aside is merely consequential or collateral to the entry of the judgment. From the arguments before us, it is obvious that Dato' Wrigglesworth could not possibly give any material evidence on (i) and (ii), that is, on the alleged failure of Mr. Bhagwan Singh to inform the Wongs the date of trial, and the alleged failure of Mr. Bhagwan Singh himself to be present at the trial on 16 May 1981. Thus, the only matter on which Dato' Wrigglesworth could possibly have personal knowledge and therefore could testify is (iii) on evidence of collateral facts not directly relevant to the entry of the default judgment.

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Further, when the summons in chambers to set aside the default judgment was filed on 18 June 1981, the former solicitors were still acting for the Wongs. The notice of change of solicitors was only filed on 23 August 1981. These relevant dates had been confirmed by Mohamed Zahir J. in his grounds of judgment when dismissing the Wongs application in Civil Suit No. 148 of 1978. It is therefore not apparent in what way Dato' Wrigglesworth could give any relevant evidence to assist the former solicitors for not filing the summons to set aside within time. It is true that Dato' Wrigglesworth did make a late attempt to

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apply for extension of time on 16 September 1981 to rectify the late filing of the application to set aside by Mr. Bhagwan Singh, but the particulars of negligence pleaded under paragraph 3(iii) is against Mr. Bhagwan Singh's late filing of the summons to set aside the default judgment, and not against Dato' Wrigglesworth last minute attempt to rectify the late filing by the application for extension of time.

But, what is more crucial is the admission made before us by Mr. Bhagwan Singh that there is no plea in the statement of defence to indicate that Dato' Wrigglesworth is either wholly or partly to blame for any of the three particulars of negligence. It is trite law that parties are bound by their pleadings and on that basis it is apparent that the reason for the subpoena on Dato' Wrigglesworth as a witness for the former solicitors has nothing to do with the defence as pleaded. The defence was filed on 16 June 1986 and it must be accepted that amending the statement of defence now after a lapse of seven years and after the case had been part heard would prejudice the Wongs which cannot be compensated by costs.

As it is not part of the defence that Dato' Wrigglesworth is guilty of any contributory negligence, we are satisfied having regard to all the circumstances, that the learned Judge ought to have come to the conclusion that on the pleadings, the former solicitors had failed to satisfy the Court on the materiality of the evidence that Dato' Wrigglesworth could possibly offer to the defence. In our view, save for annoyance and confrontation, no useful purpose would be obtained by the attendance of Dato' Wrigglesworth as a witness. Further, there is no explanation for the delay in the issue of the subpoena notwithstanding the notice given earlier, and having regard to its timing, there could be no doubt on balance, that it was an oppressive subpoena, with a *mala fide* motive of depriving the Wongs of the services of Dato' Wrigglesworth in the middle of the hearing. In the circumstances, the subpoena was an abuse of process and as such the Court had a duty to set it aside. In addition, the failure of the subpoena to identify the documents to be produced, particularly after consent was withheld by Mr. Bhagwan Singh to the inclusion of all relevant documents in the agreed bundle of documents notwithstanding the agreement already given by the 2nd respondent to such inclusion, did not assist

a Mr. Bhagwan Singh at all on the issue of *bona fide*.

As a matter of record, Mr. Robert Lazar who appeared for the 2nd respondent had indicated to us that his client did not oppose this appeal.

b Accordingly, we allowed the appeal and set aside the order of the learned Judge. The application to set aside the subpoena must be allowed. Costs to the appellants both here and in the Court below against the 1st respondent, and no order as to costs against the 2nd respondent. The deposit was refunded to the appellants.

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